No. 86-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, et al.,

Appellants,

v.

ROTARY CLUB OF DUARTE, et al.,

Appellees.

Appeal from the Court of Appeal of the State of California Second Appellate District

APPELLANTS' REPLY BRIEF

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ARGUMENT

I

Jurisdiction

While appellees continue to assert that this Court has no jurisdiction over this appeal, it should be noted that this contention is not made by intervenor, State of California. California argues only that the case is controlled by the decision in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), so that "... no reason exists for this Court to devote its full attention to the merits of this appeal." [Intervenor's brief 4] California asserts: "The California Court of Appeal properly considered and rejected appellants' constitutional

objections to the application of Unruh to Rotary International's discriminatory membership practices." [Intervenor's brief 13] Obviously, since the Court of Appeal held Unruh applicable as against the contention that such application violated the First Amendment, this Court has jurisdiction under 28 U.S.C. § 1257(2). *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 441 (1979).

Appellants have consistently asserted their constitutional arguments, commencing in the trial court:

> No existing case authority has applied . . . the Unruh Act to force an active and intimate fraternal organization such as Rotary to modify its membership preferences. To do so now would be to violate Rotary's constitutional rights to freedom of association. [Defendants' trial brief 17; Clerk's transcript 313]

Appellees' jurisdictional argument is nothing but a red herring; it should be summarily brushed aside.

Furthermore, the issues of vagueness and overbreadth (including extra-territorial impact) have been repeatedly presented for adjudication. At each stage, appellees presented opposing briefs. The mere failure of the Court of Appeal or the California Supreme Court to address either vagueness or overbreadth is insufficient reason for permitting an unconstitutional statute to stand.

II

Who Is Entitled to Constitutional Protection?

Reading the briefs of appellees, intervenor and their supporting *amici curiae*, one gets a curiously distorted view of the constitutional issue presented by this case. Such noted supporters of constitutional rights as the ACLU, the American Jewish Congress and the Anti-Defamation League of

B'nai B'rith are lined up to support, not appellants' First Amendment right to freedom of association, but appellees' claim that a state statute originally intended to eliminate discrimination in the marketplace entitles them to eviscerate such constitutional right. It must be remembered that this case involves no claim by appellees that *their* constitutional rights have been impinged by state action entitling them to relief under the Fourteenth Amendment. Rather, the sole issue presented is whether selective and exclusionary membership policies adhered to by local Rotary clubs are entitled to constitutional protection despite the claim that such policies may cause women to be disadvantaged. There is presented here a clash of asserted civil rights; appellees' rights, if any, stem from the Unruh Act, whereas appellants' are derived from the First Amendment. The question is, which are superior, and the question answers itself.

> We have therefore repeatedly held that laws which actually affect the exercise of these vital [First Amendment] rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. [*United Mine Workers of America, District 12* v. *Illinois State Bar Association*, 389 U.S. 217, 222 (1967)]

Why, then, are appellants without supporters other than organizations which see their own First Amendment rights in jeopardy? Evidently, appellees and their *amici* adhere to the belief that the Constitution only protects the good guys and that male-only membership organizations are, *per se*, the bad guys. Thus, in virtually every brief filed in support of appellees' position, great stress is placed on a single quotation from the opinion of Chief Justice Burger in *Norwood* v. *Harrison*, 413 U.S. 455 (1973):

> [A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association *protected by the First Amendment*, but it has never been accorded *affirmative* constitutional protections. [413 U.S. at 469-470] [emphasis added]

What appellees fail to note is the fact that Chief Justice Burger recognized that private discrimination is *protected;* it may not, however, claim *affirmative* constitutional protection. The *affirmative* constitutional protection which was sought and denied in *Norwood* was the right to invoke the Equal Protection Clause to require state *support* in the form of free textbooks for a discriminatory private school. The key holding of *Norwood* is:

> That the Constitution may *compel toleration* of private discrimination in some circumstances does not mean that it *requires state support* for such discrimination. [413 U.S. at 463] [emphasis added]
>
> • • •
>
> [P]rivate bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State. [413 U.S. at 469]

Rotary clubs do not seek state support. Rather, they demand that California acknowledge that the First Amendment compels toleration of their associational freedom to select their members and to exclude women from membership if they so choose.

Furthermore, *Norwood* is a Thirteenth Amendment case. The Thirteenth Amendment permits Congress to prohibit even purely private discrimination against blacks.

Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). *Runyon* v. *McCrary*, 427 U.S. 160 (1976), also cited in virtually all of the opposing briefs, is also a Thirteenth Amendment case. Justice Stewart, speaking for the Court, explicitly recognized that the cases consolidated in *Runyon*:

> . . . do not present any question of the right of a private social organization to limit its membership on racial or any other grounds. They do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. [427 U.S. at 167]

Runyon stands for no more than its holding:

> Section 1981, as applied to the conduct at issue here, constitutes an exercise of federal legislative power under § 2 of the Thirteenth Amendment. . . . [427 U.S. at 179]

The Thirteenth Amendment is not implicated in the instant case and the right of a private social organization to limit its membership on gender or other grounds must be sustained under the First Amendment.

The American Jewish Congress evidently realizes the peril which lies in its assertion that Rotary clubs may be compelled to admit women, for it devotes several pages of its *amicus* brief to defending its exclusion of non-Jews from membership. Its membership is limited to persons of the Jewish faith who subscribe to its purpose and agree to abide by its Constitution, including "a commitment to the unity and creative survival of the Jewish people throughout the world." [AJC brief 36] AJC believes that their history of religious persecution has given Jews a "very special view" on issues of free exercise of religion and separation of church and state. Therefore, AJC asserts that to force it to admit

non-Jews would seriously impinge on its First Amendment rights. Appellants support AJC's associational rights. Appellants would, however, point out that, if an Armenian or an Untouchable claimed that his group's history of persecution caused him to support the same goals, exclusion of the *entire class* of non-Jews from membership, even on the accurate assumption that *most* non-Jews might have views colored by a different history, could not be justified under a statute like the Unruh Act.

> Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply. *[Marina Point Ltd.* v. *Wolfson,* 30 Cal. 3d 721, 740, 640 P.2d 115, *cert. denied* 459 U.S. 858 (1982) quoting *Los Angeles Dept. of Water & Power* v. *Manhart,* 435 U.S. 702, 708 (1978) (italics omitted)]

Tinkering with First Amendment rights is a dangerous game. Appellants regret that the unpopularity of their position has cost them the support of groups normally in the forefront of the fight to sustain constitutional protections.[1] Nevertheless, as appellants pointed out in their Jurisdictional Statement (pp. 17-18, 22-23), the First Amendment is both color-blind and gender-blind. Freedom of association and the other rights protected by that amendment are protected whether the group invoking the Constitution is perceived as "good" or "bad", "right" or "wrong." Constitutional liberties are guarded regardless of whose ox is being gored.

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[1]See, *e.g.* the position taken by the ACLU in Village of Skokie v. National Socialist Party of America, 51 Ill. App. 3d 279, 366 N.E. 2d 347 (1977), *aff'd in part* and *rev'd in part,* 69 Ill. 2d 605, 373 N.E. 2d 21 (1978).

> [A]s is true of all expressions of First Amendment Freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational. *[Democratic Party of United States* v. *Wisconsin,* 450 U.S. 107, 124 (1981)]

The real thrust of the arguments of appellees and their *amici* is that *any* private club which excludes women deprives women of opportunities for business and social advancement which are afforded to the male members of such private clubs. Therefore, they reason, the private clubs must be characterized as business-oriented, not "strictly private," and the associational rights of the male members thereof must be denied in favor of the economic and social interests of the excluded women. The *amicus* brief filed by the California Women Lawyers, NOW and numerous other groups is explicit in this regard:

> [E]xclusive clubs and organizations, like Rotary, afford their members unique opportunities for business contacts and business deals.
>
> * * *
>
> Women need the informal contacts, networking, and professional support that membership in private clubs, such as Rotary International, offer. [NOW brief 6, 8]

Another *amicus,* the dissident Rotary Club of Seattle —International District [Seattle], asserts:

> Any organization such as Rotary which provides significant business advantages to its members should be considered commercial, and therefore subject to rational state regulation to accomplish equality of advantage for all citizens, regardless of the organization's "official" statements of a noncommercial purpose. [Seattle brief 13]

That club, which, like Duarte, seeks to admit women in violation of its agreement to abide by the Constitution of Rotary International, asserts that there can be no constitutional right of intimate association unless an organization has a "wholly noncommercial purpose," and that the absence of such attribute disqualifies *any* organization from claiming constitutional protection for its membership policies. Going further, Seattle contends that a club cannot be regarded as noncommercial if *either* it has significant [not predominant] business purposes, *or* some of the members joined for their own business reasons. [Seattle brief 41-47] Since Seattle believes that this second test can be met by the simple expedient of filing self-serving Declarations of members who wish to compel the admission of women to membership, it is evident that all-male membership organizations soon will be eliminated. No wonder Seattle only grudgingly speculates that "there *may* be some kinds of organizations [utterly unspecified or defined] which states should not be allowed to require to admit women members . . . ." [Seattle brief 41] [emphasis added]

The furtherance of goals defined in terms such as "equality" may be viewed as laudable; particular forms of selectivity may be viewed as invidious discrimination; but if the individual liberties of citizens of this great land are to be preserved, the First Amendment and its protection of associational freedoms cannot be so easily destroyed.

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. [*Olmstead* v. *United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)]

III

Local Rotary Clubs Are Private, Not Public and Are Entitled to Associational Freedom

Undisputed facts led the trial court to find that Rotary clubs utilize the "classification principle" to provide a diversity of fellowship, to prevent clubs from being dominated by a few business segments of the community, and to encourage a broad awareness of community needs to be addressed by service activities. It also found that local clubs screen potential members for the integrity of their reputation in the business community, for their dedication to the service objectives of Rotary, and for their willingness and ability to abide by the rigorous attendance and participation standards of Rotary. These "principles of selectivity" caused the trial court to find as a fact that "Rotary membership is neither solicited from nor is it available to the public generally." [J. S. App. B-4–B-5] Although the Court of Appeal held that the Unruh Act compels the admission of women to local Rotary clubs, it, too, recognized that membership is not "open . . . to the entire public at large" and that Rotary has " 'inclusive, not exclusive,' selective membership requirements." [J. S. App. C-2]

Nevertheless, appellees assert that there is no evidence that local Rotary clubs are selective. [Appellees' brief 68] Appellees stress that the Recommended Club By-Laws are not required to be adopted, but ignore the fact that membership qualifications found in Section 3 of Article 4 of the Constitution of Rotary International must be followed by all local clubs, and that almost all clubs adhere very closely to the basic steps recommended in the Manual of Procedure. [Pigman deposition, J. S. App. G-16–G-18] That a presumption of validity must be given to the trial court's

findings of fact is discussed in appellants' Jurisdictional Statement, page 9, n. 4.

Recently, the Court of Appeals for the Third Circuit had occasion to examine the nature of the Kiwanis organization, to which the trial judge in this case likened Rotary, and which has been the subject of analysis in *Roberts* and in *Kiwanis Club of Great Neck, Inc.* v. *Board of Trustees of Kiwanis*, 41 N.Y.2d 1034, 363 N.E.2d 1378, *cert. den.* 434 U.S. 859 (1977). In *Kiwanis International* v. *Ridgewood Kiwanis Club*, 806 F.2d 468 (3d Cir. 1986), *rev'g* 627 F.Supp. 1381 (D.N.J. 1986), as here, those asserting that a state statute compelled the admission of women to a local Kiwanis club contended that the attributes of Kiwanis International, rather than those of the local club, should be examined. While the Third Circuit did not reach the constitutional issues presented here, it held that the question before it was whether the local club, not the International organization, was "private" rather than "public". Focusing on the size of the club in question (28 members), national membership requirements, and local screening procedures, the Court concluded that there was not an "open and unrestricted invitation to the community at large to join Kiwanis Ridgewood." [806 F.2d at 476] The Kiwanis club was held to be private; local Rotary clubs are entitled to the same classification.

In their zeal to assert the perceived interests of women, appellees, intervenor State of California, their *amici* and the California Court of Appeal all focus on what they see as substantial business benefits to be derived from membership in Rotary. They enthusiastically point to the acknowledged fact that obtaining business benefits was an original purpose in the formation of Rotary. However, they choose to dismiss with evident disbelief the uncontroverted fact that it has been the policy of Rotary for over 50 years that membership

is not to be used for personal commercial advantage. [1981 Manual of Procedure, p. 154; Rotary Basic Library, Focus on Rotary, vol. 1, pp. 2, 68; Pigman deposition, J. S. App. G-34—G-37] While it is, of course, true that business relations conferences sponsored by Rotary clubs are of advantage to Rotarians in attendance, an equally important aspect of such conferences is that they spread the ideal of Rotary to the business community. [J. A. 14] Vocational Service is one of the avenues of service pursued by Rotarians. It is directly related to Rotary's classification principle and is intended to "create understanding within and between the various occupations in the community and insure improved ethical and practical relations among them." [J. A. 22] Rendering such service "is a personal obligation incurred by every Rotarian. In filling a classification, he becomes *the* representative of his vocation in that community." [*Id.*] Vocational Service is "simply a way of applying the concept of Rotary's ideal of service to business and the professions." [J. A. 23] Thus, the classification principle serves as means of furthering Rotary's goal of service; it is not, as appellees assert without factual foundation, a means of protecting the classification holder's monopoly over beneficial business contacts. [Appellees' brief 60]

Appellants do not deny that membership in a local Rotary club, with the camaraderie and friendship that there develop among the members, may produce some business benefits. This is natural and normal and is true of all private clubs, if their members are engaged in business. Who would not rather do business with a friend? But the trial court found as a fact, and it is supported by substantial evidence, that "business benefits are incidental to the principal purposes of the association which are to promote fellowship for *non*-commercial, and *non*-economic objectives and to secure the voluntary uncompensated participation of business

and professional men in the aforesaid 'service' activities." [J. S. App. B-3]

The very recent decision of the New York Court of Appeals in *New York State Club Association* v. *City of New York*, No. 1, slip. op. (N.Y. Ct. App. Feb. 17, 1987), does not support application of the Unruh Act in derogation of Rotarians' associational rights. The law there under scrutiny, unlike the Unruh Act, applied only to clubs which "provide benefits to business entities and to persons *other than their own members*, thereby assuming a sufficient public character that they should forfeit the 'distinctly private' exemption of the City's Human Rights Law." *Id.* at 1-2 (emphasis added). The court held that it is not unreasonable to determine that a large club which receives substantial business-related income from non-members cannot be selective in its membership and use of its facilities. *Id.* at 10. There is no evidence that local Rotary clubs, with an average membership of 46, derive *any* business-related income from non-members by regularly receiving "payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business," as required by the New York law. Further, the New York court's discussion of the First Amendment freedoms of intimate and expressive association is both cursory and superficial. It provides no guidance here.

Further evidencing the private nature of local Rotary clubs is the fact that while joint meetings with other service clubs on "specific occasions" are permitted, local clubs are directed not to hold their weekly meetings jointly with such clubs. [1981 Manual of Procedure, p. 36] Moreover, although Rotary has sponsored groups of young people of both sexes in clubs under the names Interact and Rotoract, such clubs are in no sense to be considered part of or as legal

affiliates of the sponsoring Rotary club or of Rotary International, and the members thereof are not to be called or considered as "junior Rotarians," nor may they use or wear the Rotary emblem. [1981 Manual of Procedure, pp. 194, 199] Similarly, women's clubs or similar organizations of women relatives of Rotarians are not formally recognized, nor may they use the Rotary name, emblem, Directory or any official Rotary gathering. Women's classification clubs composed of business and professional women may not become member clubs of Rotary International and participate in its conventions and other forms of administration. [1981 Manual of Procedure pp. 155-156] Local groups of women organized "separately" from Rotary and having among their objectives the support of Rotary club activities are, however, not discouraged. [1981 Manual of Procedure, p. 156]

Finally, although local Rotary clubs commonly meet in public restaurants, this is irrelevant to the primary consideration, which is not *where* the gathering takes place, but "whether the invitation to gather is open to the public at large." *Kiwanis International* v. *Ridgewood Kiwanis Club,* 806 F.2d at 474. *See also Kiwanis Club of Great Neck* v. *Board of Trustees of Kiwanis International,* 41 N.Y.2d at 1034:

> Although the Kiwanis Clubs' community-oriented activities may extend into the public sphere, the intrusion indicated on this record is not so extensive, or of the quality, as to permit governmental supervision of *essentially private activity in the constitutional sense.* [emphasis added]

Twenty years ago, a California appellate court recognized the principle which must govern this case:

> The right of adults freely to join together socially and to assemble for lawful purpose may be conceded to include the right to form and maintain clubs, secret or nonsecret, the right to be as snobbish as they choose, and any attempt at interference with that right by legislative or administrative mandate may well be said to be arbitrary, unreasonable and therefore in violation of the First Amendment. [*Robinson* v. *Sacramento City Unified School District,* 245 Cal. App.2d 278, 291 (1966)]

While the views of the California courts have changed over the years, the values inherent in the protection afforded by the First Amendment remain the same. They must be safeguarded in this case.

IV

Freedom of Expressive Association Is at Stake Here

A key issue presented by this case, and one which cannot be lightly dismissed, is that of Rotarians' freedom of expressive association. By their democratically established rules, males who comprise the membership of local Rotary clubs have decided that women shall play no formal role in the service activities which are the *raison d'etre* of Rotary. While separately organized groups of women who support Rotary's goals are not discouraged, women have no official status in the Rotary organization. Their absence has not gone unnoticed; clubs other than Duarte and Seattle have sought the admission of women and have proposed the necessary change to the Rotary Constitution. Such a change was defeated in 1972, 1977, 1980, 1983 and 1986. To this day, the vast majority of Rotarians worldwide believe that, as the trial court found, "the continued successful worldwide operation of Rotary is materially dependent on a delicate

balance of divergent attitudes in diverse cultures," [J.S. App. B-7] and they do not wish women to be admitted into membership. Significantly, Duarte's appeal from its suspension was rejected by a vote of 1060-34. [Clerk's transcript 217 FFF]

As the trial court found, the male-only membership policy of Rotary is a "fundamental and broadly accepted principle of Rotarian operation," and is cherished by the members both for the "quality of fellowship" which it provides and because of its enabling Rotary to "operate effectively over a worldwide base of varied cultures and social mores." [J.S. App. B-5—B-6]

In *Griswold* v. *Connecticut*, this Court established the governing principle:

> The right of "association," like the right of belief . . . is more than the right to attend a meeting; *it includes the right to express one's attitudes or philosophies by membership in a group* or by affiliation with it or by other lawful means. *Association in that context is a form of expression of opinion;* and while it is not expressly included in the First Amendment *its existence is necessary in making the express guarantees fully meaningful.* [381 U.S. 479, 483 (1965) (citation omitted)] [emphasis added]

While the expression of a Rotarian's attitude through his decision to join and participate in an all-male service club may be viewed by some as outmoded at best and sexist at worst, it is nonetheless entitled to constitutional protection in the absence of a compelling state interest in preventing "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages" such as were found to exist in *Roberts*, but which are absent here.

Yet, in an era where the term "women's liberation" has become a battle-cry, there are those who would reject such freedom of association as unworthy.[2] Recently, a federal court, looking at the all-male membership policy of Kiwanis, stated the question for decision as follows:

> . . . the matter to be determined is whether an organization which purports to—and indeed does—embody and encourage the most communitarian and charitable of social activities should be permitted to *impart the message* that simply because one is female she is rightfully prohibited from functioning as a decisionmaker of full stature in a structuring of such activities. [*Kiwanis International* v. *Ridgewood Kiwanis Club*, 627 F.Supp 1381, 1389 (D. N.J. 1986), *rev'd* 806 F.2d 468 (3d Cir. 1986)] [emphasis added]

The trial court held that the freedom of expressive association of members of local Kiwanis clubs could be overridden by a state statute compelling admission of women to membership. While the Court of Appeals reversed, it did not find it necessary to address this constitutional issue. The issue is directly involved in the present case, however, since the California Court of Appeal found a compelling state interest in denying to Rotarians the right of all-male expressive association even though such expression was not found to have caused any tangible economic harm. [J.S. App. C-

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[2] Of course, not all women believe that single-sex clubs are invidiously discriminatory, nor do they feel that their desires for the rendition of public service cannot be achieved but through membership in all-male organizations such as Rotary. *See amicus* brief filed by Pilot Club International, Soroptimist International of the Americas, Inc. and Zonta International, a group of all-female service clubs.

31—C-33] The holding here and that of the lower *Kiwanis* court should be expressly repudiated.

> For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, *or to the truth, popularity, or social utility of the ideas and beliefs which are offered.* [*NAACP* v. *Button*, 371 U.S. 415, 444-445 (1963)] [emphasis added]

Indeed, even a group which lacks a cohesive philosophy is entitled to define the terms on which one can become a member. In his dissenting opinion in *Democratic Party of United States* v. *Wisconsin*, 450 U.S. at 131, Justice Powell noted that "the Democratic Party, however, is not organized around the achievement of defined ideological goals. Instead, the major parties in this country 'have been characterized by a fluidity and overlap of philosophy and membership.' " (citation omitted) Nevertheless, the Court held that a statute regulating the terms on which a citizen may become a member of the Party's nominating convention violated the Party's associational rights.

V

An Additional Word about Vagueness and Overbreadth

In *Britt* v. *Superior Court*, 20 Cal. 3d 844, 855, 574 P.2d 766 (1978), the California Supreme Court recognized that "private association affiliations and activities . . . are presumptively immune" from state regulation. And, in *Marin County Board of Realtors* v. *Palsson*, 16 Cal. 3d 920, 938, 549 P.2d 833 (1976), the California Supreme Court conceded: "It has never been the law in California that a voluntary association may be forced to open its membership

rolls to all who apply." The court said that only when membership in an association is a "practical economic necessity" will the basis for exclusion be subject to court scrutiny. The plaintiff-by-plaintiff common law remedy applied in that case represents a rule of law that is congruent with any compelling state interest for ensuring access to significant economic opportunity. No such interest has been shown by California to apply the extremely broad remedies of the Unruh Act to curtail freedom of association in other situations. However, the Court of Appeal in this case held that "International and Duarte are business establishments and as such they are prohibited from discriminating against members and potential members on the basis of sex", without regard to proof of *any* actual economic injury to the plaintiffs. [J. S. App. C-31—C-33]

Now we find the State of California asserting: "Necessarily, a conclusion that an organization is a business within the meaning of the Unruh Act entails a conclusion that it is not the sort of organization which may assert a constitutional right of intimate association." [California *amicus* brief in support of Motion to Dismiss, p. 7] California also contends that a business, within the meaning of the Unruh Act, encompasses not only "places of public accommodation," but also all "groups with 'sufficient businesslike attributes' " and "enterprises 'affected with a public interest.' " [Intervenor's brief 32-36]

Indeed, California argues that "assertions of constitutional protection for discriminatory membership and guest policies of truly private clubs have been rejected. . . ." [California *amicus* brief 10] This attitude of the State of California, like the expansive recent holdings of the California courts discussed in appellants' original brief, utterly ignores the direction of this Court that "precision of regulation"

must be the touchstone where First Amendment freedoms are involved. *Elrod* v. *Burns*, 427 U.S. 347, 363 (1976).

Moreover, appellees and the State of California virtually ignore the unconstitutional uncertainty occasioned by the inconsistency of the decision here with prevailing California rules governing private interstate associations domiciled outside California. *See Signal Oil & Gas Co.* v. *Ashland Oil & Refining Co.*, 49 Cal. 2d 764, 774, 322 P.2d 1 (1958); *American Center, etc.* v. *Cavner*, 80 Cal. App. 3d 476, 485 (1978).

It is regrettable that the California Supreme Court did not see fit to review the decision of the Court of Appeal in this case. Refusal to grant a hearing is not to be deemed an acquiescence in the law as enunciated by a Court of Appeal and must not be deemed a *sub silentio* overruling of prior Supreme Court decisions. *People* v. *Triggs*, 8 Cal. 3d 884, 890, 506 P.2d 232 (1973). The decision of the Court of Appeals is clearly at odds with *Britt* and *Marin County Board of Realtors*. At the same time, it is arguably supported by other recent California decisions of extreme breadth. The situation is intolerable. The proper outlines of the Unruh Act are so vague as to be invisible; its outer limits cannot be discerned. As viewed by the State of California and the Court of Appeal in this case, it is unconstitutional under any test for vagueness or overbreadth.

Conclusion

If the Constitution exists to get "government off the backs of people," [*Schneider* v. *Smith*, 390 U.S. 17, 25 (1968)], no better place can be found for it to be utilized than in protecting the right of club members to determine who may join with them in exercising "the attributes of self-government and member-ownership traditionally associated with private clubs." *Daniel* v. *Paul*, 395 U.S. 298, 301 (1969).

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